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Supreme Court, U.S.
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No. 96-1407

In The

Supreme Court of the Unites States

October Term, 1996

James W. Coleman, Ph.D.
Petitioner

v.

Joseph E. Seagram & Sons, Inc.
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

JAMES W. COLEMAN
PETITIONER *PRO SE*
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QUESTIONS PRESENTED

I. Whether the Respondent should be estopped from denying the existence of the court-ordered job-performance evaluations on Petitioner and Respondent's other employees.

II. Whether Respondent should be estopped from denying the existence of its personnel policy documents governing its employees after 1983.

III. Whether Respondent should be estopped from relying on the oral trial testimonies which were unsupported by documentary evidence and pertain to material facts.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

ARGUMENT.....1

I. Justice demands that all of Seagram's discovery-related argument be barred under the doctrine of estoppel.....1

II. Seagram failed to cite a published authority on point to support the decision of the lower courts in not enforcing the discovery orders.....8

CONCLUSION.....10

APPENDIX

Affidavit of Carol Smith, sworn to on May 8, 1995..... A-1

TABLE OF AUTHORITIES

Cases

Page

Edwards v. Aetna Life Insurance Co. 690 F.2d 595, 598-99 (6th Cir. 1982).....1, 8

Harris v. Chipman, 97 F.3d 499, 506 (11th Cir. 1996).....8

Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1021 (9th Cir. 1989), *cert. denied, 494* U.S. 1016 (1990).....8

Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 929 (4th Cir. 1995).....8

Plott v. General Motors Corp., Packard Elec. Div., 71 F.3d 1190 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996).....9

United States v. Stan D. Owens 54 F.3d 271, 275 (6th Cir. 1995) (citing *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1217-18 (6th Cir. 1990).....1

Wayte v. United States, 470 U.S. 598, 624-25 (1985).....7, 8

ARGUMENT

I. JUSTICE DEMANDS THAT ALL OF SEAGRAM'S DISCOVERY-RELATED ARGUMENTS BE BARRED UNDER THE DOCTRINES OF ESTOPPEL.

Based on the law of the Sixth Circuit, judicial estoppel precludes a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party and accepted by the court in a prior proceeding. *United States v. Stan D. Owens* 54 F.3d 271, 275 (6th Cir. 1995)(citing *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1217-18 (6th Cir. 1990). *See* also *Edwards v. Aetna Life Insurance Co.* 690 F.2d 595, 598-99 (6th Cir. 1982). That same legal principle should apply here.

As shown herein regarding the production of the **court-ordered** documents, Seagram now takes a contrary position (Res. at 9-12). In deposition, Dr. Weber stated that he completed the "Blue Books" in their entirety on all of his subordinates, including me. R.49: Weber's depo. October 10, 1991, pp. 55, 60-61. By way of affidavit, Dr. Weber made corrections in his deposition transcript but this portion of his testimony remained unchanged. R.52: Weber's aff. with corrections. Seagram misstates the trial testimony of Dr. Frederick Weber when counsel states:

> "...that [Dr. Weber] did not fill out the sections of the '"Blue Book"' concerning promotability for [me] or for any other employees,

> and that [Dr. Weber] usually did not fill out a complete "Blue Book" on anybody while he was Section Head (Res. at 10).

Contrary to Seagram's assertion, when read in full context on this particular fact, Dr. Weber did not recant his deposition testimony at trial. R.179: Trial Transcript of May 31, 1995, pp. 69, 70. Furthermore, a "Blue Book" (on one of Dr. Weber's subordinates not covered under the **court Order)**, with all eight pages completed in Dr. Weber's own handwriting was introduced at trial. *Id.* at 70 (Plaintiff Exh. 8-1 through 8-8).

Further, on page 8 which Seagram selectively took from one of my "Blue Books" is a handwritten notation by Dr. Weber that reads: "Update of original sent to N.Y. prior to 5/15/84 update" (Plaintiff Exh. 7-4) -- meaning that my "Blue Book" had been sent to Seagram's corporate headquarters in New York City to be retained as a permanent record pursuant to Seagram's written instructions. In deposition, Dr. Weber also testified that one of my "Blue Books" which he prepared in 1984 was modified in negative ways by his immediate supervisor, Dr. Leslie Bluhm, Seagram's decision-maker. R.55: Weber's depo. October 1, 1991, pp. 200-05.

At trial by way of deposition, Dr. Bluhm testified that in 1984, he concluded that, based on the contents of my "Blue Books," I was not capable of being promoted to the Section Head position at issue. R.132: Bluhm's depo. May 10-11, 1989, p. 150; R.130: Bluhm's depo. September 12, 1989, pp. 92-95. Seagram has

never relinquished these particular "Blue Books" which were relied on by Dr. Bluhm nor any other "Blue Books" on me. Clearly, the testimonies of Drs. Weber and Bluhm are inconsistent with Seagram's current position before this Court.

Further, in shifting its position, Seagram states in essence that it could not obey the **discovery Order** substantively because the "Blue Books" on Seagram's Caucasian employees also may not have ever existed due to Dr. Weber's alleged lackadaisical attitude toward completing "Blue Books" (Res. at 10). Even if that supposition were true, the undisputed fact is that Dr. Weber was never the supervisor of all the Caucasian employees covered in that **Order**, namely: Dr. Weber himself, Bronsky, Baldwin, Coffey, Panek, Sanders, Bosworth, Wathen or Luther. Further, Dr. Weber was not always the supervisor of Ruf, Scalf and myself. In addition, that **Order** was not limited just to the production of "Blue Books" (or the earlier equivalent) (Pet. App A-4, p. 6).

In an attempt to justify its new position, Seagram relies heavily of the fact that the Sixth Circuit stated that "Seagram produced 3000 pages of employment records of [me] and other employees" (Res. at 7-8). However, Seagram failed to point out to this Court that those are the selfsame "3000 pages" that the magistrate judge acknowledged (in his June 11, 1993 **discovery Order)** that already had been produced (Pet. App. A-4, p. 4). Obviously, the "3000 pages" did not include any of the job-performance evaluations

covered under the **discovery Order** entered on November 30, 1990, February 3, 1993 or June 11, 1993 (Pet. App. A-2; A-3; and A-4, respectively).

In addition, Seagram records custodian, Mr. Robert Cherundolo, asserted under oath to the district court that no job-performance evaluations had been destroyed (Pet. at 12). In addition, Mr. Cherundolo swore under oath to that court that those job-performance evaluations ("Blue Books") were stored in "a series of locked drawers" at Seagram's corporate headquarters in New York City, and that he knows of no instance when "Blue Books" could not be found. R.129: Cherundolo's depo. September 13, 1989. pp. 69, 86, 101-03, 127. Seagram, by and through its counsel, Mr. John W. Ohlweiler, Esq. (also counsel of record for the instant petition), offered a stipulation of confidentiality (annexed with R.76: my motion to compel) as a precondition for the release of these selfsame documents. Counsel for the parties signed a negotiated stipulation of confidentiality for this purpose (Pet. App. A-3, p. 7). The magistrate judge accepted Mr. Cherundolo's sworn testimony, and the signed stipulation as facts (Pet. at 12).

When it was before the Sixth Circuit, Seagram supported its appellate Brief by advancing only the selected language from the sworn affidavits of Mr. Ohlweiler and Ms. Ann Giambusso, Esq. and stated unequivocally that Seagram produced "all of the documents covered by [my] Motions To Compel...." Obviously designed to achieve Seagram's desired results, Ms. Giambusso's affida-

vit unequivocally stated that: "The requested documents were produced to [me] on or about June 18, 1991" (Res. A-22, para. 10). She further and unequivocally swore that: "The original documents were produced for [my] review and copying in Louisville [Kentucky] on July 9, 1993 (Res. A-24-25, para. 17). Mr. Ohlweiler's sworn affidavit referenced to the Sixth Circuit stated essentially the same thing (annexed at R.112: Seagram's response to motion for sanctions). At the inspection, I personally examined all the file jackets which were presented (some of which were completely empty). As set forth in my sworn affidavit annexed to my motion for sanctions against Seagram for noncompliance, Seagram did not produce any of the **court-ordered** documents which were covered under the 1965-1985 time frame, i.e., neither originals nor copies. R.103.

Over one year after the district court had denied my motion for sanctions for noncompliance, Ms. Carol Smith, then Seagram's records custodian, came forward on May 8, 1995 with her sworn affidavit[1] which in essence expressly verified that both Ms. Giambusso and Mr. Ohlweiler had indeed made misstatements to the district court (and hence the Sixth Circuit) in connection with my motion for sanctions.

Purposely relying on the misstatements in the affidavits of both Ms. Giambusso and Mr. Ohlweiler, Seagram

---

[1] Ms. Smith's affidavit did not find its way into the record. It is offered here so that this Court may take judicial notice.

successfully persuaded the Sixth Circuit to reach the clearly erroneous conclusion that: "The district court ultimately determined that Seagram had complied fully with [my] discovery requests (Pet. App A-6, p. 2). The Sixth Circuit obviously accepted Seagram's selected language from the affidavits of Ms. Giambusso and Mr. Ohlweiler as being the whole truth of the matter, *supra*.

Unlike its position asserted to the Sixth Circuit based upon the affidavits of Ms. Giambusso and Mr. Ohlweiler, Seagram comes now before this Court with a position which is clearly contrary to the sworn testimonies of Dr. Weber, Dr. Bluhm and Mr. Cherundolo and the import of the signed stipulation, *supra*. Put simply, Seagram now asserts to this Court that it cannot be compelled to produce "what it did not have" (Res. at 11-12).

Seagram is incorrect when it states as fact "that the District Court did not limit [my] scope of discovery, nor did Seagram request such a limitation (Res. at 8)." Not in words but in actual practical terms, the lower courts effectively limited the "scope of discovery" by not enforcing the **discovery Orders**. The "scope of discovery" in the department where I worked was primarily limited to cover only those Seagram employees who were 3 to 11 pay grades below me. Even then, the production on those employees was relatively scant or nonexistent.

Finally, in a prior ruling, this Court stated that it makes little sense to address the merits of a case until

the record is complete regarding discovery. *Wayte v. United States*, 470 U.S. 598, 623 (1985)(Marshall,J., dissenting). Seagram asserted that I was "unable to dispute the District Court's findings of fact and conclusions of law..." (Res. at 2). I agree with the wisdom of the *Wayte* Court.

I will turn now to Seagram's point about the alleged nonexistence of its personnel policy document in effect after 1983 (Res. at 10-11). In contract law, it is well established that a party is estopped from denying the existence of a binding contract where he has done something intending that the other party rely on it and such reliance is detrimental to that party. In an employer-employee relationship, the personnel policy document is the 'contract' between the parties based on common sense law. Invariably, such policy document is offered by the employer, and is relied upon by the employees. There is nothing in the record which suggests or implies that the same situation did not exist in the present case. Seagram asserts that its personnel policy document in effect after 1983 cannot be found (Res. at 11). 'Cannot be found' is the functional equivalent of nonexistence. The offering party (Seagram) should be estopped from denying the existence of the 'contract'.

Concerning Seagram's contention that it would be "unduly and unfairly prejudiced" if my amended complaint regarding intangible injuries were filed of record, the doctrine of estoppel also applies here (Res. 14). On this sub-

ject, Seagram successfully argued that the memories of its potential witnesses were "nongreen" and had faded with the passage of time. The magistrate judge accepted Seagram arguments and denied motion to amend (Res. at 14). My motion in 1992 to amend was filed more than five years after the commencement of the instant lawsuit in 1987 (Res. at 12). Because of Seagram's recalcitrance regarding discovery, *supra*, I did not get to trial until 1995 -- more than 10 years after the date of the last incident. At trial, Seagram succeeded in persuading the district court to give "great weight" to the oral testimonies of Dr. Weber and Mr. James Martin (Res. at 4-6) whose memories by Seagram's own admission had faded with the passage of time, *supra*.

Clearly, Seagram's great reliance on oral testimonies, unsupported by documentary evidence, at trial and now is contrary to its prior position about "nongreen" memories. Therefore, application of the doctrine of estoppel should be invoked here to preserve the integrity of the judicial process. *Edwards* 690 F.2d at 599.

II. SEAGRAM FAILED TO CITE A PUBLISHED AUTHORITY ON POINT TO SUPPORT THE DECISION OF THE LOWER COURTS IN NOT ENFORCING THE DISCOVERY ORDERS.

Seagram cites *Wayte v. United States*, 470 U.S. 598, 624-25 (1985)(Marshall, J., dissenting); *Harris v. Chipman*, 97 F.3d 499, 506 (11th Cir. 1996); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995); *Herring v.*

Delta Air Lines, Inc., 894 F.2d 1020, 1021 (9th Cir. 1989), *cert. denied, 494* U.S. 1016 (1990); *Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190 (6th Cir. 1995), *cert. denied,* 116 S. Ct.1546 (1996), in connection with the instant discovery question (Res. at 8).

Unlike the instant petition on the question of nonenforcement of the **discovery Orders**, all the cases cited by Seagram pertain to discovery matters such as: (i) making appropriate arguments to entitlement to discovery; (ii) vacating sanctions after the defendant finally obeyed the discovery order; or (iii) denying of untimely motions to compel. Therefore, neither of those cases is on point. Finally, Seagram's reliance on the *Plott* decision is clearly misplaced because the phrase "discovery orders" is never mentioned or implied in the *Plott* decision (Res. at 8).

Seagram's argument that all my claims are mooted is legally flawed because of the discovery problems, *supra* (Res. at 12-14).

Regarding my assertion that the court's nonenforcement of its discovery Orders is of exceptional public interest in the civil-rights community, Seagram has never denied having possession of these letters nor that they were sent to the court (Res. at 12, fn. 10).

CONCLUSION

In the interest of justice, it is submitted that for all the foregoing reasons Seagram be estopped as set forth herein.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JAMES W. COLEMAN,	)	
	)	
Plaintiff,	)	AFFIDAVIT
	)	Civil Action
- against -	)	No. C-87-0022-
	)	L(M)
	)	
JOSEPH E. SEAGRAM & SONS, INC.,	)	
	)	
	)	
Defendant.	)	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CAROL SMITH, being duly sworn, deposes and says:

1. I am an employee of Joseph E. Seagram & Sons, Inc. ("Seagram" or the "Company"), the defendant in the above-captioned action, located at 800 Third Avenue, New York, New York 1002, assigned as the Custodian of Personnel Records. I am fully familiar with the facts set forth herein.

2. On May 3, 1995 through May 4, 1995, I conducted and caused others under my supervision to conduct a search of the

personnel and other records of Seagram in an effort to find the documents responsive to Request # 1, paragraph 4, of the July 15, 1991 letter of William H. Allison, counsel for James Coleman ("Plaintiff"), sent in response to Seagram Responses and Objections to Plaintiff's Second Set of Interrogatories and Request for the Production of Documents.

3. The personnel files requested by Plaintiff did not contain the specific "Merit Review Ratings, Performance Reviews, Managerial Personnel Appraisal[s], Performance Evaluation[s] for Supervisory, Administrative, and Professional Employees, Performance Evaluation[s] for Non-Exempt Employees, the three types of Performance Summary forms, Supervisor's Notes, Employee Personnel Records used to initiate salary increases, and pp. 7 and 8 of the 'blue books'" enumerated by Plaintiff, with the exception of the following, all of which were previously produced to Plaintiff:

a. E.W. Ruf

Employee Personnel Records dated 4/24/74, 7/24.75, 11/1/76 and 11/2/77; and

Documents showing salary and job title history pre-Employee Personnel Records include:

(i) Salary Change date 11/16/71;
(ii) Notices of Payroll Change dated 12/3/41, 3/3/42, 5/18/42, 6/17/42. 6/26/42, 7/29/42, 8/27/42. 1/22/43, 9/30/43, 1/9/44, 4/28/44, 9/19/44, 11/12/45, 12/4/45, 6/28/46, 1/8/47 and 1/1/58;

(iii) Transfers dated 8/8/40 and 1/2/53;

(iv) Inter-Office Correspondence dated 9/29/39 and 12/27/43;

(v) Salary Increases dated 10/11/40; and

(vi) Letters to Mr. Ruf from F.W. Klayer dated 8/20/40 and 10/4/40.

b. Joan D. Wathen

Employee Personnel Record dated 2/4/80.

c. Jose Puebla

Employee Personnel Record dated 3/6/86; and "Blue Book" dated 2/14/90.

d. Hugh Mason

Employee Personnel Records dated 1/7/80, 2/1/80, 5/584, 11/1/84 and 9/5/85;

Managerial Personnel Appraisals dated 8/1/71, 3/29/74, 4/22/74 and 12/31/74;

Performance Reviews dated 7/12/71, 7/1/72, 7/9/73, 6/6/78 and 6/6/79 and one undated Performance Reviews; Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 2/1/70; and

Performance Summary dated 6/13/80.

e. Fred Weber

Employee Personnel Records dated 2/4/80 and 11/8/84.

f. Willis V. Lord

Employee Personnel Records dated 7/24/75. 1/7/80, 5/1/80. 8/7/85, 8/1/77 and 8/7/84;

Performance Reviews dated 11/18.71, 7/16/72 and 7/9/73;

Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 2/13/69; and

Performance Evaluation for Non-Exempt Employees dated 1/25/68.

g. Sidney Baldwin

Employee Personnel Records dated 8/7/84 and 8/7/85.

h. Frank Luther

Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 5/24/60; and

Employee Personnel Records dated 4/21/75, 4/28/76, 5/2/77, 1/7/80, 5/1/80. 5/582 and 6/15/83.

i. Robert Frowenfeld

Managerial Personnel Appraisals dated 8/1/74 and 1/5/76.

j. David Redmon

Employee Personnel Records dated 1/7/80 and 11/8/84.

k. Tim Moder

"Blue Book" dated 5/24/84.

4. Dr. James Coleman's personnel file contains the following documents, all of which were produced to Plaintiff:

Merit Review Ratings dated 1/15/82, 1/19/83, 4/9/84 and 4/9/85;

"Blue Book pages 7-8 dated 5/15/84 and one set of undated "Blue book" pages 7-8;

Performance Summaries dated 6/12/80, 8/15/80, 5/5/81, 5/20.81, 1/23/82, 6/18/82, 6/24/82, 1/10/83, 1/12/83 and 1/10/84;

Performance Reviews dated 11/76 and 2/9/77 and one undated Performance Review;

Managerial personnel Appraisal dated 8/1/73;

Performance Evaluation for Supervisory, Administrative, and Professional Employees dated 11/29/65 and 2/10/67;

Performance Evaluation for Non-Exempt Employees dated 2/19/65; and

Employee Personnel Records dated 8/4/76, 1/7/80, 2/2/81, 2/4/82 and 5/6/85 and four Employee personnel Records for which the date is illegible.

"/s/ Carol Smith"

Carol Smith

Sworn to before me this
8 day of May, 1995.
"/s/ Antoinette Pisana"
Notary Public

Antoinette Pisana
Notary Public, State of New York
No. 24-4866080
Qualified in Kings County
Certificate filed in New York County
Commission Expires July 28, 1996